Supreme Court, U.S.
FILED
MAY 22 1995

No. 94-1747

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARY J. ROSSMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case (i) when she failed to file a return for more than two years after the return was due and (ii) then filed her return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 46 F.3d 1144 (Table). The opinion of the Tax Court (Pet. App. 3a-12a) is reported at 66 T.C.M. (CCH) 336.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512, are set forth at Pet. 2-4.

STATEMENT

1. Although federal income taxes were withheld from petitioner's wages during 1988, she failed to file an income tax return for that year when it was due, on April 15, 1989. More than two years later, on May 7, 1991, in the absence of any return from petitioner, the Commissioner of Internal Revenue mailed petitioner a notice of a deficiency of $17,755 in her income taxes for 1988. Two months later, on July 14, 1991, petitioner filed an income tax return for 1988. That untimely return asserted a $7,956 overpayment of her income tax liability for 1988 (Pet. App. 4a).

2. a. On August 7, 1991, petitioner sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in her 1988 income taxes. Upon review of the information contained in petitioner's untimely return of July 14, 1991, the Commissioner stipulated in the Tax Court that a deficiency did not exist in petitioner's 1988 taxes. The Commissioner further stipulated that petitioner had, in fact, made an overpayment of $5,871 in the taxes that she owed for that year (Pet. App. 4a).

Following these stipulations, the only issue remaining in the Tax Court was whether petitioner was entitled to a refund of the $5,871 overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 (Pet. App. 4a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 barred any recovery upon petitioner's refund claim (Pet. App. 3a-12a). The court noted (*id.* at 5a-6a) that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). Because, as of the date the notice of deficiency was mailed, petitioner had not filed a return for her 1988 taxes, the amount of the overpayment of tax that was refundable to her was the amount of tax she had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (Pet. App. 6a-7a, citing 26 U.S.C. 6511(b)(2)(A) and (B)). Because petitioner had not paid any of the taxes involved in this case during the two-year period preceding the notice of deficiency, the court concluded that Section 6512(b)(3)(B) barred any refund of petitioner's overpayment (Pet. App. 8a).

3. The court of appeals affirmed (Pet. App. 1a-2a). The court held (*id.* at 1a) that its decision in *Miller* v. *United States*, 38 F.3d 473 (9th Cir. 1994)—which was announced after the decision of the Tax Court in this case—is controlling in these circumstances. In *Miller*, the court noted that 26 U.S.C. 6511(a) provides that a claim for refund "shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." The court concluded in *Miller* that a return filed more than two years after

the date of payment "cannot resurrect the three-year period" for claiming a refund (38 F.3d at 475):[1]

> If the clock were to run only from the filing of the return, no claim would be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

In the present case, the court of appeals noted that, under 26 U.S.C. 6513(b)(1), the tax payments made by petitioner for 1988 were deemed paid on April 15, 1989 (Pet. App. 1a-2a). Because petitioner did not file her return and claim for refund until more than two years after she paid the taxes in question, the court held that her claim for refund was untimely (*id.* at 2a). The court therefore concluded that petitioner was barred by Section 6512(b)(3)(B) from obtaining a refund of her overpayment (Pet. App. 2a).

ARGUMENT

The decision in this case conflicts with the decision of the Fourth Circuit in *Lundy* v. *Commissioner*, 45 F.3d 856 (1995), petition for cert. pending, No. 94-1785. The decision in *Lundy* also conflicts with the Tenth Circuit's decision in *Richards* v. *Commissioner*, 37 F.3d 587 (1994), petition for cert. pending, No. 94-1537, the Seventh Circuit's decision in *Galuska* v.

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[1] See also *Oropallo* v. *United States*, 994 F.2d 25, 30 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994).

Commissioner, 5 F.3d 195 (1993), and with the unreported decisions of the Second and Sixth Circuits in *Davison* v. *Commissioner*, 9 F.3d 1538 (1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992), and *Allen* v. *Commissioner*, 23 F.3d 406 (1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992).

For the reasons set forth in the Commissioner's brief acquiescing in the petition for a writ of certiorari filed in *Richards* v. *Commissioner*, No. 94-1537, the question presented in this case is a recurring one of substantial importance on which the courts of appeals are in express disagreement.[2] Because this case presents the same question presented in *Richards*, and involves the same set of material facts that were involved in *Richards*, the petition in this case should be held and disposed of as appropriate in light of this Court's disposition of *Richards*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition of *Richards* v. *Commissioner*, No. 94-1537.

Respectfully submitted.

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MAY 1995

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[2] We are supplying counsel for petitioner in this case with a copy of our brief in *Richards*.